No. 96-1371

Supreme Court, U.S.
FILED
MAR 25 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

KENT W. LEWIS,

Petitioner,

vs.

IOWA DISTRICT COURT FOR DES MOINES COUNTY,

Respondent.

MARGARET E. HAESSLER,

Petitioner,

vs.

IOWA DISTRICT COURT FOR DES MOINES COUNTY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE IOWA SUPREME COURT

THOMAS J. MILLER
Attorney General of Iowa
GORDON ALLEN
Deputy Attorney General
*DIANE M. STAHLE
Special Assistant Attorney General
Hoover State Office Building, 2nd Flr.
Des Moines, Iowa 50319
Telephone: (515) 281-8330
FAX: (515) 281-7219

Attorney for Respondent Iowa District Court for Des Moines County

(Counsel of Record)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

23 pp

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether Petitioners' failure to produce any evidence of specific harm to their indigent clients is fatal to Petitioners' constitutional attack on the fee guidelines for court appointed counsel promulgated by the Iowa Supreme Court?

2. Whether the fee guidelines are constitutional because, as flexible guidelines, the trial judge has the ultimate responsibility and authority to set the amount of attorney fees?

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS TO DENY THE PETITION 2

I. PETITIONERS' FAILURE TO PRODUCE ANY EVIDENCE OF SPECIFIC HARM TO THEIR INDIGENT CLIENTS IS FATAL TO PETITIONERS' CONSTITUTIONAL ATTACK ON THE FEE GUIDELINES FOR COURT APPOINTED COUNSEL PROMULGATED BY THE IOWA SUPREME COURT 2

II. THE FEE GUIDELINES ARE CONSTITUTIONAL BECAUSE, AS FLEXIBLE GUIDELINES, THE TRIAL JUDGE HAS THE ULTIMATE RESPONSIBILITY AND AUTHORITY TO SET THE AMOUNT OF ATTORNEY FEES 5

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Arkansas v. Campbell, 312 Ark. 593, 851 S.W.2d 434 (1993) 7

Bias v. State of Oklahoma, 568 P.2d 1269 (Okla. 1977) 6

Bradshaw v. Ball, 487 S.W.2d 294 (Ky. 1972) 7

Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986) 7

People v. Atkinson, 50 Ill.App.3d 860, 8 Ill. Dec. 932, 366 N.E.2d 94 (1977) 6

State v. Nelson, 279 N.W.2d 1 (Iowa 1979) 3, 4

State v. Thornton, 498 N.W.2d 670 (Iowa 1993) 3

State v. Williams, 285 N.W.2d 248 (Iowa 1979) 3

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) 3

United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) 5

STATUTES/COURT RULES

Iowa Code § 13B.4, 13B.11 (1997) 4

Iowa Code § 815.7 (1997) 1

Guidelines for the Costs of Court-Appointed Counsel 1, 2, 6

STATEMENT OF THE CASE

The Petitioners are attorneys who were appointed by the court to represent parties in separate appeals of two juvenile court decisions. Iowa law requires that court appointed attorneys "shall be entitled to a reasonable compensation which shall be the ordinary and customary charges for like services in the community to be decided in each case by a judge of the district court . . . " Iowa Code § 815.7 (1997). The Iowa Supreme Court has established Guidelines for the Costs of Court-Appointed Counsel in response to its responsibility regarding payment of attorney fees and expenses for indigents. The Guidelines set forth a maximum hourly rate and total fee for various types of cases which cannot be exceeded without prior court approval. For appeals, the maximum hourly rate is $60 per hour and the total fee is $1,600.00. The Guidelines make clear, however, that the ultimate decision on the amount of attorney fees is left to the prerogative of the responsible judge in the case. (Petitioner's Appendix, p. 19-21).

The Petitioners each requested of the juvenile court that they be compensated at a rate in excess of the amount set for handling appeals. The juvenile court in each case awarded fees in excess of the guideline amounts, but less than the amount requested by the attorneys. The Petitioners did not challenge the amount of the fees they had been awarded. Rather, they argued that the constitutional rights of their indigent clients were violated because the guideline fees are so low that they have a "chilling effect" upon competent attorneys taking such cases, resulting in a lower quality of service for indigents.

The Iowa Supreme Court held that Petitioners failed to prove that the Guidelines violated the constitutional rights of indigents because the Petitioners failed to offer any evidence that indigents in fact received substandard representation as a result of the amount paid their attorneys. The Iowa Supreme Court also found that the Guidelines were not a per se violation of the constitutional rights of an indigent because they were not inflexible. Rather they merely set the maximum fee to be paid without prior court authorization.

REASONS TO DENY THE PETITION

I. PETITIONERS' FAILURE TO PRODUCE ANY EVIDENCE OF SPECIFIC HARM TO THEIR INDIGENT CLIENTS IS FATAL TO PETITIONERS' CONSTITUTIONAL ATTACK ON THE FEE GUIDELINES FOR COURT APPOINTED COUNSEL PROMULGATED BY THE IOWA SUPREME COURT.

Respondent would point out what it believes is a misperception of the facts insofar as the Petition for Writ of Certiorari fails to mention that the reason Petitioners' constitutional claims were not successful was because of a lack of evidence. The Iowa Supreme Court stated:

> Plaintiffs offer neither proof nor law to support their argument that the rights of indigent defendants are compromised by fees that are below the prevailing rate for such work in the community. Instead, they draw upon conclusions that the statutory cap creates a "chilling effect" on attorneys who are asked by the court

> to provide competent and zealous representation for an indigent client and imply that, as a result, the quality of representation indigents receive is unconstitutionally substandard."

(Petitioner's Appendix, p. 12).

The United States Supreme Court does not decide constitutional issues in the abstract. That is what would be required should certiorari be granted in this case because there is no evidence to support Petitioners' claims.

The crux of the Petitioners' argument centers on the claim that indigents are not provided the same quality of representation as are fee paying clients. As such, any equal protection or due process rights which may exist do so by incorporation of the right to counsel guaranteed by the sixth amendment. *State v. Williams*, 285 N.W.2d 248, 254 (Iowa 1979).

In order to prove ineffective assistance of counsel, a defendant must prove that counsel's performance was deficient in that he or she failed to perform an essential duty and that prejudice resulted "to the extent that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674, 698 (1984); *State v. Thornton*, 498 N.W.2d 670 (Iowa 1993). The mere fact that counsel is underpaid is alone no ground for reversal. A defendant is entitled to relief only if prejudice results. *State v. Nelson*, 279 N.W.2d 1 (Iowa 1979).

In this case the Petitioners failed to support their constitutional challenges with either facts or law. There

was no evidence presented from which one could conclude that indigents in general, or the individual clients in the particular cases at issue, did not receive competent legal counsel. If fact, the evidence that was presented showed that competent counsel is available to those in need of court-appointed counsel.

In Iowa there is a public defender system which includes an appellate defender's office. Iowa Code § 13B.4, 13B.11 (1997). (Respondent's Appendix, pp. 1-3). The private bar is called upon to accept court appointments only in situations when the public defender has a conflict or is too busy to take a case. There was no testimony offered by Petitioners with respect to how often that occurs or how many attorneys in the private bar accept, or do not accept, court appointments. None of the attorneys who testified at the hearing stated that they had ever refused to take a court appointed case because of monetary reasons. In fact, the testimony indicated that the Petitioners regularly accept court appointments. There was also no testimony that indigents received a lesser quality of legal representation than private pay clients or that the affirmance/reversal rate was any different for private clients than for indigents.

While Petitioner argued at length that it is not economically feasible for private attorneys to handle court appointments, there was a lack of evidence which would provide the nexus between the amount of payment received in this case and the quality of representation provided. As noted in *State v. Nelson*, 279 N.W.2d 1 (Iowa 1979), an attorney cannot offer a defendant only token representation because his or her compensation is inadequate. *Id.* at 3. If an attorney feels that way, the only

option is to withdraw. If the attorney continues on, the defendant must be afforded the kind of effective representation to which every defendant is entitled. *Id.*

The Iowa Supreme Court correctly held that the Petitioners failed to provide sufficient fact or law to support their claims that the Iowa Attorney Fee Guidelines are unconstitutional.

II. THE FEE GUIDELINES ARE CONSTITUTIONAL BECAUSE, AS FLEXIBLE GUIDELINES, THE TRIAL JUDGE HAS THE ULTIMATE RESPONSIBILITY AND AUTHORITY TO SET THE AMOUNT OF ATTORNEY FEES.

This Court in *United States v. Cronic*, 466 U.S. 648, 659-60, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657, 668 (1984), held that there could be a per se violation of the right to effective assistance in counsel if "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into actual conduct of the trial."

The Iowa Supreme Court rejected the possibility of a per se constitutional violation, noting that the fee guidelines do not impose inflexible caps. Rather, they set the benchmark for when attorneys must seek advance court approval. In the case of appeals, that amount is $1,600. This does not mean that anyone who is appointed to represent an indigent in a court appointment will never receive more than $1,600 for that appeal. All it means is that if the attorney anticipates that he or she will exceed

that amount, the attorney must get prior court authorization.

The guidelines provide that the ultimate determination as to amount of fees rests with the trial court and is to be based upon statutory and case law, evidence presented at the hearing on fees, the court's own experience and all other information relevant to the issue of the reasonable value of the attorney's services in the community in question. (Respondent's Appendix, pp. 6-7). The fees suggested in the guidelines are thus but one factor to be considered by the court in making the ultimate determination of "the reasonable value of the attorney's services in the community in question." (Respondent's Appendix, p. 7). The guidelines state at § 5(d) that "[n]othing in these guidelines, however, is intended to affect the prerogative of the responsible judge to determine the amount of compensation by appropriate ruling on the application." (Respondent's Appendix, p. 7).

The result reached by the Iowa Supreme Court is in accord with the case law in a number of other states which have found court-appointed fees unconstitutional only when counsel was totally uncompensated, or the guidelines were totally inflexible. *See, Bias v. State of Oklahoma*, 568 P.2d 1269, 1272 (Okla. 1977) (statute limiting fee in murder case to $250 not unconstitutional where counsel able to maintain regular practice and not required to incur extraordinary expense); *People v. Atkinson*, 50 Ill.App.3d 860, 8 Ill. Dec. 932, 366 N.E.2d 94, 99 (1977) (no sixth amendment violation unless counsel was totally uncompensated or unless the bar was required to assume the entire burden of indigent defense for nominal compensation with no provision for a public defender

system); *Makemson v. Martin County*, 491 So.2d 1109, 1112 (Fla. 1986) (Florida statute unconstitutional because set inflexible maximum fees regardless of unusual or extraordinary circumstances); *Arkansas v. Campbell*, 312 Ark. 593, 851 S.W.2d 434 (1993) (statute which set attorney fee cap with no provision for the court to award additional fees found to be unconstitutional on its face); *Bradshaw v. Ball*, 487 S.W.2d 294, 298 (Ky. 1972) (it is unconstitutional to impose the entire burden of indigent expense on attorneys, with no compensation).

The attorney fee guidelines in Iowa are not per se unconstitutional. They are not inflexible and they are not so low as to fall below what is reasonable compensation.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

THOMAS J. MILLER
Attorney General of Iowa
GORDON ALLEN
Deputy Attorney General
*DIANE M. STAHLE
Special Assistant Attorney General

Hoover State Office Building, 2nd Flr.
Des Moines, Iowa 50319
Telephone: (515) 281-8330
FAX: (515) 281-7219

Attorney for Respondent Iowa District Court for Des Moines County
**(Counsel of Record)*

APPENDIX

Iowa Code § 13B.4 and § 13B.11 ..... App. 1
Attorney Fee Guidelines ..... App. 4

* * *

13B.4 Duties and powers of state public defender.

1. The state public defender shall coordinate the provision of legal representation of all indigents under arrest or charged with a crime, on appeal in criminal cases, and on appeal in proceedings to obtain postconviction relief when ordered to do so by the district court in which the judgment or order was issued, and may provide for the representation of indigents in proceedings instituted pursuant to chapter 908. The state public defender shall not engage in the private practice of law.

2. The state public defender shall file with the clerk of the district court in each county served by a public defender a designation of which local public defender office shall receive notice of appointment of cases. Except as otherwise provided, in each county in which the state public defender files such designation, the state public defender or its designee shall be appointed by the court to represent all eligible indigents, whether the case is criminal or juvenile in nature. The appointment shall not be made if the state public defender notifies the court that the local public defender will not provide legal representation in cases involving offenses as identified in the designation by the state public defender.

3. The state public defender may contract with persons admitted to practice law in this state for the provision of legal services to indigent or partially indigent persons.

4. The state public defender is authorized to review any claim made for payment of indigent defense costs

and to take the following action if the state public defender believes a claim is excessive:

a. If the claim is from a noncontract attorney, the state public defender shall request a review by the court granting the claim as to the reasonableness of the claim within thirty days of receipt of the claim.

b. If the claim is from a contract attorney, the state public defender shall request a review by the appointing court as to the reasonableness of the claim within thirty days of receipt of the claim.

5. The state public defender is authorized to contract with county attorneys to provide collection services related to court-ordered indigent defense restitution of court-appointed attorney fees or the expense of a public defender.

6. The state public defender shall report in writing to the general assembly by January 20 of each year regarding any funds recouped or collected for court-appointed attorney fees or expenses of a public defender pursuant to section 331.756, subsection 5, or section 602.8107 during the previous calendar year.

7. The state public defender shall adopt rules, as necessary, pursuant to chapter 17A to administer this chapter and section 815.9.

* * *

13B.11 State appellate defender.

The state public defender shall appoint a state appellate defender who shall represent indigents on appeal in criminal cases and on appeal in proceedings to obtain

postconviction relief when appointed to do so by the district court in which the judgment or order was issued, and may represent indigents in proceedings instituted pursuant to chapter 908 when required to do so by the state public defender, and shall not engage in the private practice of law.

* * *

GUIDELINES – COSTS OF COURT-APPOINTED COUNSEL

See also R.Cr.P. 26.3

1. In implementation of its constitutional duty to exercise supervisory and administrative control of the judicial department, the supreme court deems it necessary to adopt these guidelines to establish procedures for carrying out judicial department responsibilities relating to payment of attorney fees and expenses for indigents when the law requires such payment from public funds.

2. Nothing in these guidelines shall prevent public bodies from establishing public defender offices pursuant to statute or from entering contracts for attorney services consistent with constitutional and statutory constraints. These guidelines shall apply only to court appointment services in situations where compensation is required by law to be determined by a judge of the district court.

3. In making such appointments, the courts shall consider the attorney's competence, diligence and availability to perform the assigned service. The court also shall consider accessibility of the attorney to the represented person, as well as other relevant factors bearing on the effectiveness and efficiency of services.

4. In performing services, attorneys shall be governed by applicable statutes and rules as well as by relevant provisions of the Iowa Code of Professional Responsibility for Lawyers.

a. When required to do so by law or when the attorney has any question about the propriety of incurring a particular expense, the attorney shall obtain court approval before incurring the obligation.

b. In addition, the attorney must obtain advance district court approval for anticipated compensation in excess of amounts that shall be established for particular categories of cases from time to time by the supreme court. Until modified by subsequent order of this court, those amounts are as shown on exhibit "A" attached to these guidelines.

(1) The purpose of requiring such approval is not to inhibit reasonably necessary services, but to provide a system for monitoring and a basis for predicting and budgeting amounts necessary for such compensation.

(2) In determining whether an application should be sustained, the court shall consider whether the anticipated services are necessary in the reasonable professional judgment of counsel. The requirement that an application be made shall not have any bearing on whether an application should be sustained. Moreover, the court shall not require disclosure by the attorney of any information not subject to discovery under applicable law.

(3) Such applications, except as to appeals, ordinarily shall be made at arraignment, and in any event within the period available for discovery prior to trial. They shall not be made later except upon a showing of good cause.

c. Nothing in these guidelines shall affect the duty of the court to determine the amount of allowable compensation for court appointment services in accordance with applicable statutes.

5. Upon completion of services, the attorney shall file with the clerk of the district court a written application for compensation for court appointment services and expenses. The application shall be accompanied by an itemized statement showing the time necessarily spent on the case, the nature and extent of services and expenses, the penal consequences involved, the difficulty of handling and importance of the issue, responsibilities assumed and results obtained.

a. A copy of the application shall be provided to the county attorney.

b. If written request for hearing is not filed with the clerk within fifteen days after a copy of the application has been provided to the county attorney, or if hearing is earlier waived, the clerk shall direct the application for ruling to the trial judge, or if the case was not tried, to the presiding judge in the case. If hearing is requested, the clerk shall direct the application to the appropriate judge, as above stated, for hearing and ruling.

c. When hearing is held, the parties shall have the opportunity to offer evidence relevant to the factors affecting the amount of compensation.

d. In any event, the judge with responsibility for determining compensation is encouraged to consult with other judges of the district to obtain advice and guidance. Each district should establish procedures to facilitate

such consultation. Nothing in these guidelines, however, is intended to affect the prerogative of the responsible judge to determine the amount of compensation by appropriate ruling on the application.

6. When applicable law requires compensation to be made on the basis of ordinary and customary charges for like services in the community, the court shall not reduce compensation based on an attorney's duty to represent the poor but shall consider all of the factors dictated by pertinent statutory law and supreme court decisions, including certainty of payment. Moreover, the court shall consider the evidence, its own knowledge on the subject, and any other relevant information bearing on the issue. In order to provide guidance to the court and to foster uniformity in compensation for like services in like communities in the state, the supreme court shall from time to time promulgate guidelines including a range of hourly rates reflecting ordinary and customary charges for like services in the communities of the state, as provided by statute. Until modified by subsequent order of this court, that range is determined as shown in exhibit "A" attached to these guidelines. These guidelines shall be considered by the court, along with all other relevant information, in determining the reasonable value of the attorney's services in the community in question.

7. If aggrieved by the court's ruling, either the attorney or public entity may seek appellate review of the compensation award pursuant to the certiorari rules of the supreme court.

EXHIBIT A

Amounts which cannot be exceeded without prior approval of the district court in accordance with paragraph 4"*b*" of the guidelines:

1. Class A felonies, $2,500.
2. Class B felonies, $1,500.
3. Class C and D felonies and aggravated misdemeanors, $1,000.
4. Serious misdemeanors, $500.
5. Misdemeanors, $150.
6. Probable cause portion of parole revocation hearings, $200.
7. Postconviction relief proceedings, one-half of the present guideline for the offense in the original action.
8. Appeals to the Iowa Supreme Court, $1,600.
9. Representation of children in dissolution matters, $300.
10. Representation of patient at mental or substance abuse commitment hearing, $150.
11. Representation of party at juvenile case adjudication and disposition, $500. Representation of party at each additional review hearing to be determined by the court.
12. Representation of indigent wards, $150.

Range of hourly compensation in accordance with paragraph 6 of the guidelines: $40 to $60 per hour for attorneys, $20 to $30 per hour for paralegal/legal assistants.

App. 9

[Supervisory Order August 19, 1985, effective September 3, 1985; December 12, 1986, effective February 2, 1987]